

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARL FREY

Claimant

VS.

ALL STATES WINDOWS & SIDING, LLC

Respondent

AND

AMCO INSURANCE CO.

Insurance Carrier

Docket No. **1,036,927**

ORDER

Claimant requests review of the December 7, 2007 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found claimant was an independent contractor on the date of his accidental injury and accordingly held that claimant did not sustain his burden of proof that an employer/employee relationship existed. Consequently, the ALJ denied claimant's request for compensation benefits.

The claimant requests review of whether the ALJ erred in finding that claimant was an independent contractor. Claimant argues he was a statutory employee of the respondent because he was performing work that was an integral part of respondent's trade or business as he was performing work which is also performed by respondent's employees. In the alternative, claimant argues respondent is precluded under the theory of equitable estoppel from denying claimant's claim for worker's compensation benefits.

Respondent argues claimant was a self-employed independent contractor and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

On September 4, 2007, claimant was installing siding on a house when the step ladder he was standing on slipped out from underneath him and he fell injuring his foot. Claimant sought treatment at St. Joseph Hospital and has continued to follow-up with Dr. Robert Eyster.

Claimant owns and operates a construction and remodeling business, Popeye & Associates Home Repair, LLC. He has two or three employees working for him. In June 2007, claimant and his employees began working for respondent. Respondent is a business that sells and installs replacement windows, siding and doors primarily for residential buildings. The claimant and his crew were hired by respondent to install siding and windows. Claimant testified that respondent provided the projects, siding, and windows as well as negotiated the price for installation and collected the monies. Respondent paid claimant by the square foot per job. Respondent also provided a written list of policies for claimant and his crew to follow. Claimant testified:

Q. Just to give the Court a general idea, what kind of written policies did All States have as it relates to the work that your company was doing?

A. They gave me a list when I first started there that says, before each job, when you come to pick up the sheets of paper stating what kind of material was on the job, where the job was, how big it was, what it was going to pay, there was also a sheet attached that says take a job sign from our warehouse, take it out and put it at the job, you are to work from 8:00 to 5:00, six days a week, weather permitting, to keep the homeowners happy, show them that you are there doing the work, you are to wear our company T-shirts, our company hats, every one of your employees are to wear company T-shirts, company hats every day.¹

Claimant further testified respondent provided the sign, t-shirts, and hats. Respondent would inspect the project while it was being done and also after it was completed. Claimant testified that respondent hired claimant and his company to install siding and windows for respondent on a full-time basis.

Claimant testified that he was required to provide All States with proof of general liability insurance before he could work. When claimant received his first check, he noticed \$280.42 had been withheld. Claimant testified that Mr. Larry Stitt and Chris Keeter advised claimant that it was for workers compensation.

Q. And what was your understanding of why that was being withheld based on your conversation?

A. Well, the conversation was they was holding 15 percent out of each of my checks for work comp, they were having work comp cover me and my crew.

¹ P.H. Trans. at 11.

Q. So did you believe that the 15 percent that was being withheld from each settlement check was being utilized to purchase insurance, work comp insurance for you?

A. Yes.

Q. Did All States prior to your accident ever require you to go out and get a work comp insurance policy and present that to them that you were covered by work comp?

A. No.²

Lawrence Stitt, respondent's production manager, testified that all subcontractor's are required to provide proof of both general liability and workers compensation insurance. And although claimant provided a certificate it was later determined claimant did not have workers compensation coverage. Mr. Stitt further testified:

Q. Now, at the time Mr. Frey was injured, which was in September, 2007, were there other independent contractors performing work under contract with All States?

A. We always have some subcontractor working for us because we never -- we don't ever have as much employees -- we just only try to tackle 75 percent of our load so when it slows down we don't have to let employees go. So we always have 25 percent of all of our work goes out to subcontractors just as a rule of thumb.

Q. And this 25 percent of your work on behalf of All States that goes out to the subcontractors that you contract with, are all of the subs contracted under the same terms essentially as far as insurance requirements and what you negotiated for the pay for the work performed?

A. Yes.³

Mr. Stitt testified the subcontractors are paid on a piece-meal basis and that there are no withholdings taken out of those checks. He further testified the subcontractors provide their own trucks, trailers and tools.

Chris Keeter, respondent's owner, testified Carl Frey d/b/a Popeye & Associates received payments on a piece-meal basis. Mr. Keeter also testified that money was withheld from claimant's payments so that he could procure insurance. Mr. Keeter testified:

² P.H. Trans. at 20.

³ Stitt Depo. at 12-13.

Q. And why were those moneys withheld?

A. When it was found that Carl did not have his workers' comp policy that was turned in to us was not valid, then we deduct a percentage - - the labor rates that are paid are a rate that would include the contractor to provide workers' comp and liability insurance. If that policy is not in effect, then we withhold those funds so they could procure insurance.

Q. So your company holds that money back.

A. Yes.

Q. So as of September 4, 2007 when Mr. Frey fell and was injured while working on an All State job, you knew he did not have workers' compensation insurance.

A. Yes.

Q. And despite that knowledge, he was allowed to work for your company.

A. Yes.

Q. As a subcontractor.

A. Yes.

Q. And you were withholding money from his checks for general liability and workers' compensation insurance.

A. Workers' compensation insurance.⁴

Claimant argues that under the theory of equitable estoppel the respondent cannot deny the claim because it withheld money from the paychecks to purchase workers compensation insurance. This Board Member agrees.

Kansas has applied the doctrine of equitable estoppel in workers' compensation proceedings.⁵ In *Scott v. Wolf Creek* the Court of Appeals held that the employer was not estopped from asserting the exclusive remedy provision of the Workers Compensation Act despite the fact that the employer told the employee's widow that workers compensation benefits were not available. Relying on the employer's representation, the employee's widow delayed filing a worker's compensation claim. The Court of Appeals did rule, however, "that estoppel would be available to plaintiffs in workers compensation

⁴ Keeter Depo. at 29-30.

⁵ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d, 501, 6 P.3d 421 (2000); *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d 156, 928 P.2d 109 (1996).

proceedings and the issue should be resolved in that forum.”⁶ Estoppel was later applied in the subsequent workers compensation action brought by Scott’s widow to toll the running of the written claim statute.

In *Marley v. M. Bruenger & Co., Inc.*, the Kansas Court of Appeals held claimant to the terms of his written agreement with respondent by finding claimant was estopped from denying he was an independent contractor.

The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.⁷

Also, the agreement between Marley and M. Bruenger & Co., Inc., specifically dealt with the question of workers compensation insurance. It placed the burden of obtaining coverage on the claimant. In this case it is clear that claimant believed the money respondent was withholding from his pay was for the purpose of obtaining workers compensation insurance coverage not only for him but also for his employees. The fact that respondent was withholding from the gross amount of claimant’s pay shows that the coverage was not limited to claimant’s employees, if any.

Respondent argued the money was withheld so that claimant could procure the necessary workers compensation insurance. But such argument does not make sense when respondent had the money and claimant did not. This Board Member finds the claimant’s testimony more persuasive that respondent withheld money to purchase workers compensation insurance for claimant and his crew.

Regardless of whether claimant elected to come under the Workers Compensation Act as a self-employed independent contractor by paying respondent to provide workers compensation insurance coverage or, if instead, claimant is to be treated as an employee or statutory employee of respondent for purposes of the Workers Compensation Act, respondent is estopped from denying that the Act applies to this claim. Whether or not there is insurance coverage is a separate contract question between respondent and its insurance carrier.⁸ As claimant’s right to collect preliminary hearing benefits is not affected

⁶ *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d. at 162-163.

⁷ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d at Syl.¶ 1.

⁸ *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan. App. 2d 492, 794 P2d 662 (1990).

by that contract question, that is not a jurisdictional issue.⁹ This Board Member finds the ALJ's Order should be reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 7, 2007, is reversed and remanded to the Administrative Law Judge for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of February 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁹ K.S.A. 44-534a(a)(2); See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

¹⁰ K.S.A. 44-534a.

¹¹ K.S.A. 2006 Supp. 44-555c(k).